United Nations A/C.6/52/SR.17

General Assembly
Fifty-second session

Official Records

Distr.: General
19 November 1997

Original: English

Sixth Committee

Summary record of the 17th meeting
Held at Headquarters, New York, on Thursday, 30 October 1997, at 10 a.m.

Chairman: Mr. Tomka ..... (Slovakia)

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97-82388 (E)

The meeting was called to order at 10.10 a.m.

Visit by the President of the International Court of Justice

1. **The Chairman** welcomed Judge Stephen Schwebel, President of the International Court of Justice and a former member of the International Law Commission.

2. **Mr. Schwebel** (President of the International Court of Justice) said that the International Court of Justice had been busier in recent years than ever before in its 50-year history. It currently had eight cases on its list, which was not as modest as it sounded, since only States could be parties to contentious cases before the Court. The potential pool of litigants thus did not exceed 190. In addition, the United Nations and its specialized agencies were entitled to request advisory opinions of the Court. The most recent and important of the 23 opinions requested over the years was the Court's 1996 opinion in response to a question of the General Assembly on the legality of the threat or use of nuclear weapons. The docket of the Court was also limited because the parties had to agree to the Court's jurisdiction, which, in many international legal disputes, they did not. Nevertheless, the Court's current docket was substantial, consequential and broad.

3. The *Qatar* v. *Bahrain* case concerned the resolution of territorial claims and the limitation of maritime boundaries. The cases brought by the Libyan Arab Jamahiriya against the United Kingdom and the United States dealt with the applicability of the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation and the Libyan effort to interdict sanctions imposed by the Security Council because of its alleged involvement in the Lockerbie atrocity. They raised questions concerning the powers of the Security Council in relation to the treaty rights of a party to a multilateral treaty, and questions concerning extradition and terrorism. The Court had recently concluded hearings on jurisdiction and admissibility in both cases. The *Oil Platforms* case concerned claims by the Islamic Republic of Iran that United States attacks on Iranian oil platforms during the war between Iraq and Iran had violated the Iran/United States Economic Relations Treaty of Amity, Commerce and Consular Rights, raising questions not only of treaty interpretation but also of aggression, self-defence, neutrality and the law of war. Another major case before the Court was that of Bosnia and Herzegovina against Yugoslavia, in which it was claimed that the alleged promotion of "ethnic cleansing" by the Federal Republic of Yugoslavia in Bosnia was a violation of the Convention on the Prevention and Punishment of the Crime of Genocide. The case between Cameroon and Nigeria concerned title to the Bakassi peninsula, as well as problems concerning the length of the boundary between the two States. There was also a case concerning Canada's seizure of a Spanish fishing vessel on the high seas in an area in which Canada claimed the right to take protective measures to preserve fish stocks. The most recent case, brought by special agreement between Botswana and Namibia, concerned title to a fluvial island.

4. The geographical spread of the parties currently before the Court was gratifying. It compensated somewhat for the relatively low number of States — 60 — accepting compulsory jurisdiction under the optional clause.

5. In 1996, the Court had issued judgments upholding jurisdiction in the *Oil Platforms* case and the *Genocide* case, and had issued an Order for provisional measures in the *Land and Maritime Boundary* case brought by Cameroon against Nigeria. It had also rendered two advisory opinions, one finding that the World Health Organization lacked authority to request an advisory opinion on the legality of the use of nuclear weapons, and the other dealing with the complex and portentous question of the legality of the threat or use of nuclear weapons. In 1997, the Court had been fully occupied for most of the year with the complex *Gabčikovo-Nagymaros* case, on controversial dam locations, brought by special agreement between Hungary and Slovakia. Judgment had been given on 25 September.

6. The Court was clearly very active, and yet, like the United Nations, it was suffering from financial deprivation. Its budget, of less than $11 million a year, funded entirely by the United Nations, was a minute and diminishing proportion of the Organization's budget. At a time when the international community had launched three new international courts and was considering establishing a fourth, it needed to fund adequately the supreme judicial organ of the United Nations, the International Court of Justice. The Court was working with the Secretary-General, the Advisory Committee on Administrative and Budgetary Questions and the Fifth Committee to mitigate its severe financial difficulties. If the Court were more adequately funded, it would be able to deal more effectively with the backlog in publications of judgments and advisory opinions and of pleadings, and with the shortage of staff, which affected all aspects of its work. In particular, the Registry had only a small legal staff, and, despite significant economies achieved by having only two official working languages (English and French), the translation staff was inadequate for the demands placed on it.

7. Such factors affected the productivity of the Court, although the perception that cases took a long time to come to judgement was not always based on a sound analysis of the process involved. States parties to a case before the Court engaged in meticulous preparation of their pleadings, typically requiring many months to review their own and the other party's pleadings. In cases brought by application, for example, the average time limit for filing the memorial and counter-memorial was one and a half years. In exceptional cases, such as the Lockerbie cases, it could take as long as three years, at the request of the parties. The process could be further prolonged if there were preliminary objections to jurisdiction, and requests for extensions of time limits for filing were not uncommon. States, of course, had a sovereign right to present their case as they saw fit, and counsel and advisers had a professional obligation to be extremely thorough in their presentation, as a court of 15 or more judges could be impressed, sometimes unpredictably, by a spectrum of different arguments. Such thoroughness, coupled with technological advances and ease of document reproduction, might explain the large volume of pleadings and documentary annexes the Court had to translate, examine and digest.

8. In cases begun by application, the Rules of Court provided for the consecutive filing of a memorial by the applicant and a counter-memorial by the respondent. Almost invariably, a reply and rejoinder were also scheduled. In cases begun by a special agreement, the Court would normally sanction whatever filings the parties had agreed on. In the absence of agreement, each filed a memorial, simultaneously, followed by a simultaneous counter-memorial. Replies were also usually authorized by the Court, resulting in six written pleadings, which inevitably lengthened the whole process, increased the workload of the Court and Registry, and complicated the task of the States themselves. Moreover, as parties did not always reveal their arguments completely at the memorial stage, a third round of written pleadings was often inevitable.

9. Translation was another vital factor. Each member of the Court had the statutory right to work in either English or French, and, in the interests of equality, all pleadings and documents had to be translated from one into the other, except in the rare cases where parties filed pleadings in both languages. Moreover, the pace of work of the Court depended on the ability of members, for some of whom neither French nor English was their native language, to follow proceedings in those languages. In the recent *Gabčíkovo-Nagymaros* case, pleadings and documents amounted to some 5,000 pages. Even with outside help, the underfunded translation service took a considerable time to produce adequate translations. Nor could much be done in the way of advance preparation, since the sparing use of translation resources meant devoting them to the next case to be heard.

10. The Court's practice had been to hear cases, as far as possible, in the order in which they were instituted. The resources available dictated that the Court would normally handle the active phase of hearing and deliberation in only one case at a time. Allowing for provisional measures and other urgent matters, it did happen that written pleadings in a case closed long before a date could be set for oral hearings, occasioning some comment. However, it was not always possible to bring forward the oral hearings or to reschedule a case to take the place of one which had been withdrawn or settled. Parties insisted upon adequate time to prepare, and the Court could not force them to appear at a time that suited the Court. During apparent lacunae in the Court's schedule, the Court was actually fully occupied dealing with pleadings, procedural matters in other pending cases and administrative matters. All the Court's cases were at different procedural stages; none of them was currently dormant.

11. At the same time, the Court's methods of work were not swift. They had been designed to enable a universal court, representing the principal legal systems of the world, to deal with cases in such a way as to reflect the views of 15 judges. The methods of work were effective, but there was room for a procedural review to enhance the Court's productivity, without impairing the quality of its judgments. The Court had already begun to give serious attention to that complex problem, and some progress had been achieved.

12. With regard to the hearings, the oral phase itself was not unduly long. Once the case had been heard, the Court focused on producing a judgment as rapidly as was compatible with the interests of justice, and in accordance with the rules established by the Resolution on the Internal Judicial Practice of the Court, which was structured so as to permit each member to participate in the deliberative process on an equal footing. After the close of oral arguments, agreement was reached on the issues on which decisions were required, and each judge drew up a note in one of the Court's official languages, analysing the issues of the case and his provisional solution to them. Those notes, which taken together generally ran to hundreds of pages, were then translated into the other official language and distributed to the other judges for their consideration. In order to preserve the confidentiality of deliberations, notes were later destroyed and one copy was left on registry files, to which not even judges could have access. The notes phase was followed by an in-depth deliberation, at which each judge

spoke in turn. Once a majority had agreed on the points to be decided, a drafting committee was elected from among the members of that majority.

13. A first draft of the judgment was then produced in both languages and circulated for comment. Written amendments were submitted for inclusion in the drafting committee's revised draft for the first reading, which was conducted by the full Court, examining the text line by line. The drafting committee then produced a revised text, which was given a second reading and formally adopted in its final form by he Court.

14. Judges wishing to append separate or dissenting opinions had to prepare them in the same time-frame as the judgment. Their full participation in discussions ensured that the judgment was the judgment of the whole Court, while the drafting committee could take separate and dissenting opinions into account in its revision of the draft judgment for the second reading. The Resolution on Judicial Practice provided an essential mechanism to impose discipline in that process.

15. Although time-consuming, the step-by-step procedure was clearly structured, ensuring equality of participation for all members and safeguarding the forward momentum of the work.

16. He did not wish to suggest that the way the Court worked could not be improved. But he hoped that he had conveyed a sense of the care which the Court took in carrying out its responsibilities.

17. **The Chairman** said that it was encouraging to note the truly universal nature of the jurisdiction of the International Court of Justice, particularly since it was only very recently that a region had been reluctant to recognize it. Efforts to increase the efficiency and effectiveness of the Court were ultimately a matter for the Court itself to discuss and decide on. However, the fact that the Court, as the highest judicial body of the United Nations, received only 1 per cent of the United Nations budget was cause for concern. If the Court's effectiveness was to be enhanced, it would need the support and financial backing of all States Members of the United Nations.

18. **Mr. Tankoana** (Niger), referring to Article 94 of the Charter of the United Nations, asked the President of the International Court of Justice to explain what the Court could do to ensure compliance with its judgments where parties brought a special case before it, but might or might not enjoy the veto in the Security Council.

19. **Mr. Schwebel** (President of the International Court of Justice) said that where parties to a dispute agreed to bring a special case before the International Court of Justice, it was legally beside the point whether they explicitly agreed to be bound by the Court's judgment, since Article 94 of the Charter indicated that the Court's judgments were binding on Member States. That Article, which provided that a party might have recourse to the Security Council to give effect to the judgment of the Court, had rarely been invoked for a number of reasons, including the veto. However, given the change in the political climate over the past decade, Article 94 might become effective. While it was true that the Court had no power to enforce its judgments, there was a very high rate of compliance, even in the case of judgments that were very painful to certain parties.

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20. **Mr. Sepulveda Amor** (Mexico) said that his delegation welcomed the report of the International Law Commission, including its chapter III, entitled "Specific issues on which comments would be of particular interest to the Commission". It hoped that a similar chapter would appear in future reports.

21. The draft articles on nationality in relation to the succession of States and the commentaries to them (A/52/10, chap. IV) were well balanced and would contribute to the standardization of rules on that topic. Of particular merit was the inclusion of the principles on recognition of the right to a nationality in the context of the succession of States. His delegation also considered that respect for the will of persons concerned, reflected in draft article 10, provided a desirable complement to the rules laid down in the draft articles. The application of the principle of effective nationality on the basis of a real connection — the principal criterion being habitual residence — should also help to resolve many of the problems arising from the succession of States. Its importance in international law was such that it had been essential to recognize the principle in the draft articles. No doubt there were other criteria that could be taken into account in determining nationality, in keeping with the circumstances of each case. Given the various forms that the succession of States could take, the Commission had acted wisely in elaborating specific rules for each category of succession, whether it involved the unification or dissolution of States or the transfer or separation of part of their territory. It was, however, worth stressing that the draft articles applied to the effects of a succession of States occurring in conformity with international law only and for that reason it was important to retain draft article 27, in order to underline the fact that the draft articles did not apply to

acts prohibited by law, such as military occupation or the illegal annexation of a territory. Lastly, the draft articles should contain rules on succession as it affected the nationality of legal persons and he hoped that the Commission would consider the latter two issues further.

22. The topic of reservations to treaties merited particular attention (A/52/10, chap. V). However, the submission of preliminary conclusions might be considered premature at such an early stage of the discussions. His delegation would have preferred a wider exchange of views between the Commission and States before the submission of what was, of necessity, a partial view. The preparation and consideration of two reports remained pending for 1998: one on the definition, formulation, withdrawal and acceptance of reservations and objections to reservations and the other on the effects of reservations, the acceptance of reservations and objections to reservations. Other reports ought to be prepared before the first reading in 2000. Breaking up the pieces of a mosaic that should be seen as a whole could lead to a distorted picture.

23. With regard to the substance of the preliminary conclusions, his delegation considered that, in view of the universality of a large number of international instruments drawn up under the Vienna Conventions on the Law of Treaties of 1969 and 1986, the flexibility of the reservations regime in those Conventions should be retained and applied to all treaties, regardless of their nature. Special arrangements for particular issues were not appropriate.

24. It was for States parties to decide on the admissibility of reservations to a given instrument. The monitoring bodies set up under some agreements could not oppose or counteract the essence of the commitments made by a State party in expressing its consent to be bound by a treaty. A monitoring body could not and should not be a substitute for Governments, nor could it pronounce on the nature and the scope of a State's obligations. In the event of a dispute it was for the competent legal bodies to assess and decide on the permissibility of a given reservation.

25. Of the 12 preliminary conclusions, only the first three were unquestionable; the other nine were open to dispute. The conclusions should, therefore, be reviewed and in many cases reformulated. While a monitoring body could draw attention to a specific reservation, it should not be involved in the formulation of commentaries or recommendations on the admissibility of the reservation in question.

26. With regard to State responsibility (A/52/10, chap. VI), his delegation stressed the importance of the Commission's work plan for the quinquennium. Discussions should be stepped up so that draft articles could be adopted on second reading before the mandate of current members of the Commission had ended. To that end States should establish close communication with the Commission, while the Commission should address the concerns of Governments.

27. His delegation welcomed the Commission's decision to continue studying the topic of international liability for injurious consequences arising out of acts not prohibited by international law (A/52/10, chap. VII). There was a growing need for clear rules limiting the nature of the discretion with which States interpreted and complied with certain obligations, especially those aimed at ensuring that activities carried out in areas under their jurisdiction or control did not cause damage to other States or to areas beyond the limits of their national jurisdiction. It was regrettable that only modest advances and been made, owing to the reluctance of States to contribute to the definition of the scope of a regime of liability for such activities. Principle 22 of the Stockholm Declaration — reflected in many later international instruments — imposed on States the obligation to cooperate in developing that area of law. Steps should be taken to put that obligation into effect. The Commission's agreement to continue its work on the topic was welcome, but an integrated approach would be preferable. The question of compensation or other forms of reparation for the adverse effects of transboundary damage as a result of activities covered by the draft articles should be given pride of place, since it was fundamental to the draft. The current title of the topic accurately reflected its content and scope and there was no need to change it; any change should be made when the final form of the draft was known, not at the current stage of proceedings. With regard to draft articles 4, 6 and 9 to 19, on which the Commission had invited comments, his delegation attached importance to notification and prior consultation between the State under whose authority a hazardous activity was undertaken and the States that might be affected by such an activity, and also to the preparation of studies to consider the transboundary effect produced by a hazardous activity. Those issues should be given greater weight.

28. As to diplomatic protection (A/52/10, chap. VIII), his delegation endorsed the Commission's decision to limit its consideration to indirect harm, or harm to natural or legal persons whose case was taken up by a State. Of particular importance was the principle of the exhaustion of local remedies in the context of diplomatic protection. The draft articles should fully safeguard the exhaustion of local remedies as a precondition of the exercise of protection of its nationals by a State. Chapter three of the preliminary plan of work did not give sufficient attention to that; indeed, other

criteria tending to diminish its relevance were given more weight. The resulting imbalance should be corrected.

29. The Commission had rightly judged that it would be useful to consider at the initial stage the question of protection claimed by international organizations, for the benefit of their agents to determine whether such protection should be included within the scope of the articles. His delegation would await the Commission's proposals before stating Mexico's position on the matter. Meanwhile, there was surely no need to distinguish between international organizations and regional economic integration organizations. In addition, some issues such as the basis of diplomatic protection for legal persons, required clearer and more detailed definition. The same applied to the chapter on the consequences of diplomatic protection.

30. With regard to the unilateral acts of States (A/52/10, chap. IX), State practice was such that consideration of it would be useful, opportune and feasible. There was, indeed, a need to make a systematic formulation of the various principles and rules governing obligations and rights so as to define how such acts functioned and what their consequences were. His delegation took note of the outline for the study proposed by the Commission and the suggestion that it should be improved as work moved ahead. It also supported the idea that the study of unilateral acts by international organizations should form part of a future, separate analysis, since it was qualitatively different from the scope appropriate to States.

31. The Commission's work programme (1998-2001) would be difficult to carry out, in view of the number of items of wide scope and great complexity already before it and the limited length of its sessions, but the Committee could rely on its competence and dedication. Some topics merited priority attention, such as State responsibility and international liability for injurious consequences arising out of acts prohibited by international law. The work programme as it stood, did not seem to recognize the priority that should be given to those two topics. The Commission should approach the work programme flexibly, to enable it to conclude its work on some topics that had been on its agenda for several decades or ones whose importance was unquestionable. The topic of extraterritorial jurisdiction undoubtedly merited the attention of the Committee and the international community; the lack of clear and definite rules in that regard had already generated conflict and aroused controversy. The Commission was a suitable forum for working out principles on the limits of extraterritorial jurisdiction, and inclusion of the topic in the work programme would be beneficial to relations between States.

32. **Mr. Santaputra** (Thailand) expressed satisfaction with the Commission's adoption on first reading of the draft articles on nationality of natural persons in relation to the succession of States, which effectively met the pressing need to ensure greater judicial security for States and individuals: the articles addressed a wide array of concerns, such as transfer of part of the territory, unification of States, dissolution of a State, or separation of part of or parts of the territory. Questions of nationality in situations such as military occupation or illegal annexation of territory had been excluded, since such situations were in contravention of international law.

33. His delegation attached particular importance to the fundamental right of every person to a nationality, the core principle behind the draft articles, and to the prevention of statelessness, which the draft articles declared to be an obligation of all States. Respect for the will of persons concerned should also be taken into consideration. Furthermore, provisions on exchange of information, consultation and negotiation were desirable; such interaction could be helpful in preventing or remedying detrimental effects of succession and giving effect to the right to a nationality.

34. His delegation endorsed the approach taken in the draft articles on nationality with regard to unity of a family, which, rather than requiring all members of a family to acquire the same nationality, upheld the principle that acquisition or loss of nationality in relation to the succession of States should not undermine the unity of a family. The inclusion of draft article 12, relating to the nationality of children born after the succession of States, merited praise not only because it was consistent with other instruments relating to the rights of the child but also because it addressed lacunae in cases where parents died while the process of nationality approval was still pending.

35. His delegation supported the inclusion of legal persons in the draft articles on problems of nationality in the context of succession of States, since it would address potential problems arising from the fact that legal persons were playing an increasingly important role internationally and were developing closer relations with States.

36. The subject of reservations to treaties should be given serious attention, since it constituted one of the fundamental aspects of international law. The lacunae in the Vienna regime should be filled and its ambiguities relating to reservations should be removed, as far as possible within the framework of the Vienna Conventions, particularly with respect to the object and purpose of the treaty, which was

the principal criterion for determining the admissibility of reservations.

37. The problem of the definition of reservations and interpretative declarations merited more detailed study. His delegation therefore looked forward to receiving information from the Special Rapporteur and the Commission on their consideration of that topic. In the meantime, it took note of the Commission's preliminary conclusions on reservations to normative multilateral treaties, particularly subparagraphs 1, 2 and 7 (A/52/10, para. 157).

38. With regard to "State responsibility", he noted with satisfaction that the Commission planned to complete the second reading of the topic by the end of its quinquennium.

39. On the topic of international liability for injurious consequences arising out of acts not prohibited by international law, he took note of the Working Group's findings that the scope and the content of the topic remained unclear due to such factors as conceptual and theoretical difficulties, appropriateness of the title and the relation of the subject to "State responsibility", and that the issues of prevention and of liability should be dealt with separately.

40. Concerning the topic of unilateral acts of States, he shared the Working Group's view that work on the codification and progressive development of the applicable legal rules was advisable and feasible, bearing in mind that States increasingly carried out unilateral acts with the intent to produce legal effects, and that the rule of law could be strengthened by an attempt to clarify the functioning of those kinds of acts and what the legal consequences were.

41. Turning to "Diplomatic protection", he said that the question of claims brought by States on behalf of their nationals against another State was acquiring greater significance with the increased exchange of persons and commerce across State lines. The scope of the topic should include not only natural and legal persons, but also ships, aircraft and spacecraft, which also held the nationality of a State. While further consideration should be given to the form which the outcome of the work on the subject should take, he believed that either a convention or guidelines would be appropriate.

42. With regard to international organizations, it was recognized that they were becoming increasingly entwined with States. Nevertheless, States and international organizations differed as to their nature and the type of diplomatic protection which they afforded. He therefore believed that, taking into account the relationship between the protection exercised by States and functional protection exercised by international organizations, the latter should be studied further.

43. **Mr. Suhendar** (Indonesia), recalling General Assembly resolution 51/160, in which the Assembly had invited the Commission to undertake a substantive study of the topic of nationality in relation to the succession of States and to give priority to the consideration of the question of the nationality of natural persons, agreed with the Commission that, although nationality was essentially governed by national legislation, in the specific context of a succession of States, international law had a significant role to play, as such a situation might involve a change of nationality on a large scale. It was important for the draft articles to reflect an appropriate balance of interests among the individuals and States concerned; he therefore hoped that the Commission's further work on the topic would help to fill the gaps in the existing law in that area.

44. With regard to the topic of reservations to treaties, he agreed that the Vienna regime should be preserved, as the rules which it contained could be regarded as having acquired a customary value. A guide to practice in respect of reservations would be useful to States in determining their practice on that question. Moreover, the proposed model clauses could serve as models for States and should be designed to keep possibilities of disputes to a minimum.

45. Turning to "State responsibility", he looked forward to completion of the work on the basis of the recommendation of the Working Group. The topic needed to be dealt with in a broader context, taking into account the interests of developing countries.

46. On the topic of international liability for injurious consequences arising out of acts not prohibited by international law, he noted that the Commission's work took place in the context of the achievements of the United Nations Conference on Environment and Development.

47. With regard to "Diplomatic protection", he looked forward to the results of the study to be undertaken by the Commission. He also expressed appreciation for the work carried out thus far on the topic "Unilateral acts of States".

48. The recently concluded Colloquium on the progressive development and codification of international law was a source of satisfaction, as was the offer by the Government of Switzerland and the Graduate Institute of International Studies to organize a seminar in 1998 to celebrate the fiftieth anniversary of the International Law Commission. For developing countries in particular, the organization of seminars under the auspices of the Commission had proved

beneficial for students and professors of international law as well as government officials.

49. Lastly, he believed that cooperation between the Commission and the Asian-African Legal Consultative Committee should be strengthened, so that the views of non-aligned countries would be reflected in the development of the norms of international law.

50. **Mr. Tang Chengyuan** (Secretary-General of the Asian-African Legal Consultative Committee) said that the Asian-African Legal Consultative Committee (AALCC), greatly appreciated the role played by the Commission in the progressive development and codification of international law. At its inception, the Commission had included few representatives of African and Asian States; those States had therefore deemed it imperative to conduct a systematic examination of the rules of international law and to express their views on the subject through a competent forum. Accordingly, the main objective behind the establishment of AALCC had been to forge closer cooperation among African and Asian States and to create a regional forum in which to make their views known.

51. The activities and functions of AALCC, as envisaged in its statute, were centred on the consideration of legal problems referred to it by member Governments and on following up the work of the Commission and of the United Nations. In preparing detailed notes and comments on draft articles adopted by the Commission, the aim of AALCC was not to establish a separate system of international rules, but to promote general agreement on a just system of law reflecting the interests of the entire international community.

52. The Commission and AALCC had standing invitations to each other's sessions. In recent years, the Commission had also been represented at the meetings of legal advisers of States members of AALCC held in New York during sessions of the General Assembly. Many members of the Commission were also members of delegations attending AALCC sessions and thus monitored and reviewed the work of the Commission on more than one occasion. The links between the two bodies had been further strengthened when the General Assembly had accorded permanent observer status to AALCC and it had begun to be represented in the Sixth Committee during the consideration of the report of the Commission.

The meeting rose at noon.